No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

LOUIS TOM DRAGNA

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

FRED OKRAND
257 South Spring Street
Los Angeles 12, California

Attorney for Appellant
Louis Tom Dragna

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TOPICAL INDEX

		Page
Table of Authorities		ii
I.	THE EVIDENCE IS INSUFFICIENT (Reply to Appellee's Point VI, B, 3 (c) (4); pp. 228-229).	1
II.	THE TRIAL COURT FAILED TO INSTRUCT THAT MERE KNOWLEDGE OF, OR ACQUIESCENCE IN, ILLEGAL CONDUCT BY OTHER DEFENDANTS OR ASSOCIATION WITH THEM, IS INSUFFICIENT TO ESTABLISH A DEFENDANT AS A MEMBER OF A CONSPIRACY (Reply to Appellee's Point VI, 2, (b); pp. 315-316).	10
III.	THE TRIAL COURT FAILED TO COMPLY WITH RULE 30 (Reply to Appellee's Point C, 1; pp. 304-307).	11
IV.	COUNT FIVE IS UNINTELLIGIBLE (Reply to Appellee's Point VI, A, 2(b); pp. 159-161).	13
V.	APPELLANT ADOPTS INSOFAR AS APPLICABLE TO HIM THE POINTS MADE IN THE REPLY BRIEFS OF THE OTHER APPELLANTS HEREIN.	16

TABLE OF AUTHORITIES

Cases	Page
Dennis v. United States (CA 10, 1962), 302 F. 2d 5	5, 6
Grunewald v. United States, 353 U.S. 391	14
Krulewitch v. United States, 336 U.S. 440	14
Lutwak v. United States, 344 U.S. 604	14
McDonald v. United States (CCA 8, 1937), 89 F. 2d 128	14
United States v. Bufalino (CA 2, 1960), 285 F. 2d 408	5, 9

Rules	
Federal Rules of Criminal Procedure,	
Rule 30	11, 12
Rule 52(b)	15

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I

THE EVIDENCE IS INSUFFICIENT
(Reply to Appellee's Point VI, B 3(c)(4); pp. 228-229)

Bearing in mind that the showing as to Dragna's (as with any defendant in a conspiracy case) membership in the alleged conspiracy must be done by means of evidence of his own acts, declarations and conduct, and considering that the conspiracies here charged were (1) "willfully to obstruct, delay and affect interstate commerce by means of extortion" (CT 2), and (2) "Willfully and with intent to extort money and a thing of value . . . to transmit in interstate commerce communications containing threats" (CT 9), it simply

cannot be said that such evidence had been produced by the prosecution in this case. In this connection, sight should not be lost of the fact that Judge Tolin, at the time of his death, had under consideration, and had not denied as he had the other defendants' (RT 7806), Dragna's motion for judgment of acquittal at the end of the case (ibid).

Appellee has attempted to set forth (Br. 228) what it considers to be the important evidence showing this appellant's membership, i. e. agreement, in the conspiracy. We submit it has not shown enough. 1/ (See Dragna Op. Br. p. 29.)

Considering first the state of the record at the conclusion of the prosecution's case, we set forth here in haec verba what appellee considers to be the evidence of Dragna's acts, statements and conduct which go to show that Dragna entered into the alleged unlawful agreement. This from appellee's brief, pages 228-229):

> "On May 4, 1959, Dragna entered Leonard's office with Palermo. . . . Dragna listened to Palermo's

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1/ Parenthetically, though not at this point, appellee describes appellant as "furtive and sinister in the day to day conduct of (his) business affairs . . . without offices or roots in any community in this country and (that he) employed crude methods in (his) acquisition of money and economic power" (Br. 11). There is just not one word in the record, not one word, to substantiate this statement. Indeed there is positive evidence precisely to the contrary. Thus, Dragna lives in Los Angeles County with his wife and child (RT 5601) and he owns his own home (ibid). He is the general manager of Tropicana Sportswear in Los Angeles and had been employed there for three years at the time of the trial (ibid). He has lived around Los Angeles at least since the 1930's (RT 5643).

diatribe [2] about Leonard having double-crossed the appellants [3] with respect to the control of Jordan. . . . Dragna added: 'Well, you are wrong there, Jackie'. [4] Dragna told Leonard he was dealing with big people [5]. . . Dragna asked Leonard if Nesseth did not live out his way and Leonard, attempting to mislead Dragna, [6] said that Nesseth lived near San Bernardino. Dragna, knowingly, [7] said that Nesseth lived in West Covina. Then Dragna pointedly [8] inquired: 'He has a wife and kids doesn't

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2/ The word is appellee's. Palermo's conversation can hardly be thus described (RT 728-732).

3/ This is grossly incorrect. There is not one word in what Palermo told Leonard (RT 728-732) which could even faintly be described as referring to "appellants", i.e., the defendants in the action. Indeed, there is nothing in the conversation (ibid) about anybody's being double-crossed.

4/ Appellee omits to state that this sentence by Dragna is in response to a question put to him by Palermo. Leonard testified (RT 729): (Palermo) "turned to Mr. Dragna and said, 'I want you to hear this' ". And after stating what he wanted Dragna to hear, Palermo then said to Dragna, according to Leonard (ibid): "What do you think of that?" And then Dragna answered.

5/ This again was a statement by Dragna after Palermo had asked for his, Dragna's, opinion (RT 730). And appellee omits what Dragna said immediately thereafter (ibid): "and your word should be your bond". Such advice, sometimes solicited, sometimes not, has been given elsewhere and cannot be said to be unsound.

6/ There is nothing in the record which justifies such a description. In any event this is Leonard talking, not Dragna.

7/ Again an inference of appellee's not justified by the record.

8/ Having set up a straw man as to what it says the agreement was, appellee proceeds to infuse life into him (Continued)

he?' . . . Dragna said: 'You are right in the middle of this thing, Jack'. And he said: 'You better try to get it straightened out or', he says, 'you can be in a lot of trouble'. [6 RT 728-732] Dragna asserted, in the course of the session that 'he was acquainted with these people'. (Referring to the Carbo group.) 9/ [12 RT 1700.]"

This is the evidence upon which appellee would have this Court sustain a holding that Dragna entered into and was a member of the conspiracies alleged in Counts I and V. Prior to the conversation described by appellee, and subsequent thereto, there is not one word, and not a single exhibit, in the prosecution's case of conduct by Dragna. 10/ Cf. Leonard's testimony before the California Athletic Commission as to the conversation (RT 1521):

"He (Dragna) didn't say anything, no threats. No -- in fact, he was a very good gentleman there. He did very little talking. Listened."

We submit that so far as this appellant, Dragna, is concerned, the assertion that he was a member of, a party to, an

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8/ (Continued) by this barbed description or ordinary small talk. We explain below how the question of where Nesseth lived came about. And it should not be overlooked that in testifying under oath before the State Athletic Commission, Leonard said (RT 1522) that he could not recall whether it was Dragna or Palermo who asked whether Nesseth had a wife and child.

9/ As the parenthetical interpolation by appellee and the record (12 RT 1700) shows, this is an interpretation of Leonard's. Actually Dragna never said (ibid) that he knew Carbo or Gibson; indeed, he said he did not (RT 5607-5608), and certainly he never said he knew "the Carbo group".

10/ Indeed, in the whole case there is only one Government exhibit having anything to do with Dragna, and that (Exh. 143) on an irrelevant matter on rebuttal (RT 5717, 5725).

agree-er to, a conspiracy or conspiracies such as alleged in Counts I and V of the Indictment is as much a concoction and figment of the prosecution's imagination as was the Government's theory of an agreement in United States v. Bufalino, 285 F. 2d 408 (CA 2, 1960). Appellee theorizes as to what the conspiracies were in this case, but so far as this appellant is concerned, it has failed to prove it. Its evidence in this regard is more flimsy than was even the evidence as to Cannone and Guccia in the Bufalino case. The method of the prosecution here in throwing all the evidence in and using it without discrimination as to all the defendants, demonstrates here, as in Bufalino, that it is "especially important for trial and appellate courts to determine the sufficiency of the evidence as to each defendant in mass conspiracy trials" (285 F. 2d at 417).

The Court's attention is also directed to the cases of appellants Durkin and Powers in Dennis v. United States, 302 F. 2d 5 [11/] (CA 10, 1962) (a conspiracy to file false non-Communist affidavits) where the appellate court held (at page 12) that as to those appellants the evidence was insufficient even though, as to Durkin, the evidence showed he was a member of the Communist Party and even had knowledge of the conspiracy, and as to Powers that he was a member of the Communist Party and knew of the influence that that Party had in the labor union. In the instant case, the evidence is much weaker, from the standpoint of the

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11/ In appellant's opening brief, page 31, this citation was erroneously given as 302 F. 2d 31.

prosecution, than it was in the case mentioned. In holding the evidence insufficient, the court there said (302 F. 2d at 12):

> "Mere knowledge, approval or acquiescence in the object or purpose of a conspiracy does not make one a conspirator. . . .
>
> " . . . Without knowledge, the intent to participate in an established conspiracy cannot exist, and ' . . . to establish the intent, the evidence of knowledge must be clear, not equivocal'. . . ."

These concepts are eminently applicable here.

Not content with the showing it had made during the presentation of its case in chief, appellee felt impelled in its resume about Dragna to rely (Br. 228) on the testimony of Dragna himself and that of defendant Palermo. Thus, appellee correctly states (ibid) that "Dragna met with Palermo at Puccini's Restaurant on the evening of May 1, 1959, the day Palermo arrived in Los Angeles. [38 R. T. 5615-5616; 40 R. T. 6030-6037.]" But appellee fails to point out that the very references on which it relies shows that the meeting was a chance one, that Dragna was having dinner with his wife, that Palermo happened to come in (RT 5615) and that there was no pre-arrangement or appointment for the meeting (RT 6032).

Appellee goes on (Br. 228): "Dragna admitted that Palermo suggested that he, Dragna, contact Leonard [38 R. T. 5618-5619.]" But appellee omits setting forth that this very citation shows that

the suggestion to contact Leonard was because Leonard knew how to contact the manager of a fighter about whom Palermo had told Dragna and in whom Dragna had expressed some interest and that the suggestion had nothing to do with this case (ibid).

Appellee continues (Br. 228): "Palermo told Dragna that the purpose of his coming to Los Angeles concerned Sugar Hart". Presumably the reference appellee had in mind was 38 RT 5666-5667, since that is the reference it cites after the sentence following the one just quoted. In the first place, Palermo's telling Dragna that his purpose in coming to Los Angeles concerned Sugar Hart does nothing to show that Dragna conspired as charged in the Indictment. But more importantly, and demonstrating how the Government, after thinking up a conspiracy, is pressed to such extremes as making something, or, rather, seeking to make something, out of nothing, is this: At 38 RT 5667, Government counsel inquired of appellant whether Palermo had told him "why he was in Los Angeles at that particular time". Appellant's answer was: "I stated the Sugar Hart fight". And, indeed, so had appellant stated, and the record shows a perfectly innocent and obvious conversation which might normally occur between two acquaintances, one from one town and one from another, in a chance meeting in a restaurant when one is out for dinner with his wife. Appellant asked Palermo what he was doing in town and Palermo told him he was in to make a match involving a fighter named Sugar Hart (38 RT 5616). Surely appellee is hard pressed in seeking to bottom its case upon this slim event.

Then appellee says (Br. 228): "Dragna told Palermo to telephone him on May 4, and provided Palermo with a telephone number. [38 R. T. 5666-5667.]" What appellee omits is that after Palermo told Dragna of the possibility of obtaining a good fighter, Dragna told Palermo he would have to talk to his boss to see if he'd be interested and for Palermo to call him (38 RT 5621-5622).

Since appellee has chosen to rely upon Dragna's testimony (Br. 228), the complete story should not be left untold. Dragna's boss,[12/] Mr. Nober, corroborated defendant's testimony (RT 5619) as to being interested in obtaining the fighter, Toluca Lopez (RT 5731-5732)[13/] and that he told defendant to go out and see Leonard and find out more information about the fighter (RT 5733). Also, the witness Salvatore Casavona (RT 2952) corroborated defendant's testimony as to why he went out to see Leonard, namely, to see him about the fighter, Lopez (RT 5624, 5676).

Defendant's wife, likewise corroborated defendant as to the meeting with Palermo at Puccini's (RT 5745-5749).

Although called by the Government on rebuttal (RT 6349-6399), Leonard did not contradict -- indeed he was not even asked about -- the testimony of Dragna (RT 5627) and the conversation

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12/ Actually not his employer as such, but the man who supplied defendant's business with the major portion of its contract work (RT 5724). Appellee sought to make much of the fact that defendant referred to Mr. Nober, the man who supplied the cut fabric for defendant to make up into dresses (ibid), as "boss" (RT 5721-5725), another example of the extreme ends to which appellee has been forced to go.

13/ And about the reference to himself as "boss" (RT 5737, 5739-5740, 5742).

which had taken place in Leonard's office, including defendant's version as to how it came about that Nesseth's place of residence was discussed, namely, that Leonard was trying to get Nesseth on the telephone (RT 5627); that Dragna wanted to leave because he had far to go and had to work that night (ibid and 5630) that when Leonard had talked to Nesseth's wife, Dragna, who was waiting to take Palermo to a cab (RT 5629), asked what the telephone prefix was (RT 5630); that when he learned it was Edgewood, defendant remarked that Nesseth lives out near him (West Covina [RT 5600]) and could not get home so soon in the traffic (RT 5630).

Nor did the Government, with its vast and efficient investigatory services, seek to challenge defendant's testimony that he did not know Daly, Gibson nor Carbo (RT 5607-5608) and had never spoken to them or Sica on the telephone (RT 5634).

In United States v. Bufalino, 285 F. 2d 408, 418 (CA 2, 1960), the court pointed out "the danger of sweeping within the net of . . . a conspiracy an innocent visitor". The prosecution did that very thing here.

The evidence is insufficient as to this appellant.

II

THE TRIAL COURT FAILED TO INSTRUCT THAT MERE KNOWLEDGE OF, OR ACQUIESCENCE IN, ILLEGAL CONDUCT BY OTHER DEFENDANTS OR ASSOCIATION WITH THEM, IS INSUFFICIENT TO ESTABLISH A DEFENDANT AS A MEMBER OF A CONSPIRACY.
(Reply to Appellee's Point VI, 2, (b); pp. 315-316.)

As we read appellee's argument on this point, it does not dispute appellant's statement of the law or the cases he cites (Dragna Op. Br. 35-37). Appellee simply asserts that instructions which the court did give, citing (Br. 316) RT 7653-7655, 7657, 7677-7678, complied with the law.

We disagree. We do not think, for example, that an instruction which reads (RT 7657) 14/:

> "It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that it was the design that the law be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty."

is an instruction such as requested by appellants (CT 648) that:

> "Mere association of one defendant with another defendant or co-conspirator does not establish the

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14/ We assume this is the instruction appellee had in mind when it cited this page in the record.

existence of the conspiracy or participation therein."

or (CT 655) that:

> "Proof of the unlawful agreement and of defendant's participation therein with knowledge of the unlawful agreement is essential, and mere evidence of participation in the offense, which is the object of the conspiracy, is insufficient."

The court did not properly instruct on this important phase of the law.

III

THE TRIAL COURT FAILED TO COMPLY WITH RULE 30.

(Reply to Appellee's Point C, 1; (pp. 304-307)

Appellee's own argument shows how appellants were in this case prejudiced by the failure of the trial court to advise them what its instructions were going to be. Thus, in its argument as to appellants' point of the failure of the court to instruct the jury pertaining to its duty to acquit, appellee says (Br. 326-327): "Failure of so many experienced counsel to notice any deficiency in the court's instructions . . . suggests prima facie that the plain error suggested . . . did not occur". But the instructions to the jury are not part of a game. Appellants believe that the court erroneously failed to instruct on the point and that they were entitled to so fundamental an instruction. Had the court advised

defense counsel, by telling them what it was going to charge the jury, and thus indicating that it was not going to give such a fundamental instruction, this error could have been avoided. That it was not, with due respect to the compliment to the competency of counsel, shows the prejudice.

Again, appellee suggests (Br. 325 and 322) that the failure to object under Rule 30 as to the Gibson cautionary instruction (RT 7789) and the overt act instruction (RT 7654), precludes complaint here as to those instructions. Had the court complied with what we contend is the true meaning of Rule 30, such an argument, even though, we submit, incorrect, could not be made here.

Moreover, if the trial court had advised counsel what instructions it was going to give, the various other errors in the instructions, of which appellants complain, and as to which appellee does not seek Rule 30 protection, would not have occurred. We submit that in a case as complex as this one, expecting counsel to catch errors in the instructions, either by way of omission or commission, on the run, so to speak, is not the proper and orderly way for the conduct of a trial. It violates the spirit, if not the letter, of Rule 30. It deprived defendants of a meaningful opportunity to assure that correct instructions would be given.

IV

COUNT FIVE IS UNINTELLIGIBLE
(Reply to Appellee's Point VI, A, 2(b) pp. 159-161)

Appellee misapprehends appellant's point. And in its discussion, by arguing that distinctions and separations are not necessary, it demonstrates and explains the confusion that must have been the jury's and why all sorts of evidence came into the case which was irrelevant to it.

Appellant's point is not (Appellee's Br. 159) that a conspiracy indictment must allege overt acts which post-date the entry into the conspiracy of every member thereof, albeit we apprehend the prosecution would be hard pressed to show the membership in the conspiracy of such a late entrant. But appellant does contend that acts or conduct which are alleged to have taken place after the conspiracy has ended have no place in either the pleadings or proof. We shall not dwell on the prejudicial nature of the reputation paragraph at issue. (Reply to appellee's argument concerning the reception into evidence of the reputation testimony and the right of the prosecution to have the reputation sub-paragraph in the Indictment altogether (Appellee's Br. Point VI, A, 1; pp. 127-155) is being made in the reply brief on behalf of appellant Sica and so is not repeated here.)

Appellee fails to understand that the conspiracy it has alleged in Count V is (CT 9) "with intent to extort money and a thing of value . . . to transmit in interstate commerce

communications containing threats". That is the "scope of the conspiratorial agreement". (Grunewald v. United States, 353 U.S. 391, 397.) Once this has been done, after showing the agreement and the overt acts, the conspiracy is over and the Government is no more entitled to adduce its desired proof here, concededly prejudicial, than it has the right to adduce proof of concealment after the conspiracy is over as held by the court in Grunewald v. United States, 353 U.S. 391, Krulewitch v. United States, 336 U.S. 440, and Lutwak v. United States, 344 U.S. 604. McDonald v. United States, 89 F. 2d 128, 133-134 (CCA 8, 1937), cited by appellee, is not authority to the contrary. Indeed, it supports appellant because it points out the necessity for ascertaining just what the conspiracy is and when it ends.

The point is that, as to the conspiracy charged in Count V,[15/] once the last telephone conversation took place (April 29, 1959 [CT 9-10]), that was the end of it.[16/] The Government's effort to continue the matter on is an attempt to do that which the Supreme Court has repeatedly said it disfavors: "broaden the already pervasive and widesweeping nets of conspiracy prosecutions". (Grunewald v. United States, 353 U.S. 391, 404.) The conspiracy

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15/ The Government stoutly maintains that there were two conspiracies charged in the indictment (CT 58, line 22).

16/ Proof of this may be seen from the Government's own words (Br. 170): "(T)he conspiracy charged in Count Five could have been pleaded and proved without a single overt act involving a telephone conversation". But the agreement would have to be shown, and that agreement would have to include an agreement to make an interstate telephone call containing threats.

charged in Count V was a conspiracy to make threatening interstate telephone calls. The reputation sub-paragraph and the evidence adduced pursuant thereto have nothing to do with that charge.

The fact that paragraph 3(c) may have been an essential allegation in Count I, a proposition with which appellant disagrees, but which is treated elsewhere, does not justify its inclusion in Count V. Who can tell how the jury would have considered the evidence had it been told that it was not permitted to consider the reputation evidence as to Count V? The Government's willingness to "throw everything in", while understandable in a conspiracy case and too often effectuated, cannot excuse the expansion of the vice.

The error of leaving paragraph 3(c) in Count V was so substantive that this Court should notice it whether appellant made this specific argument in the court below or not (Appellee's Br. 161) (Rule 52(b), Federal Rules of Cr. Proc.). But, we think the point was adequately raised and argued below (CT 46, 59;17/ cf. CT 279-286).

17/ The prosecution, in arguing against the motion to strike the sub-paragraph, said (CT 59, line 23): "It is not matter which is extraneous to the indictment".

V

APPELLANT ADOPTS IN SO FAR AS APPLICABLE TO HIM THE POINTS MADE IN THE REPLY BRIEFS OF THE OTHER APPELLANTS HEREIN.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

FRED OKRAND

Attorney for Appellant
Louis Tom Dragna